

**Before the
Federal Communications Commission
Washington DC 20554**

In the Matter of)	
)	
Federal Preemption of)	
Anne Arundel County Ordinance)	WT Docket No. 02-100
Regulating Radio Frequency Interference)	

REPLY COMMENTS OF VOICESTREAM WIRELESS CORPORATION

VoiceStream Wireless Corporation (“VoiceStream”)¹ hereby replies to certain of the comments that were filed in response to the Petition for Declaratory Ruling filed by Cingular Wireless LLC (“Cingular”) for federal preemption of recent amendments to the Anne Arundel County (“County”) zoning ordinance, which regulate radio frequency interference (“Petition”).² VoiceStream strongly supports the Petition and agrees with the many comments filed to that effect.

As virtually every commenter makes clear, the Anne Arundel County zoning ordinance, as amended (the “ordinance”), represents an unlawful attempt by the County to use its zoning authority to regulate matters unrelated to zoning – in this case radio frequency interference (“RFI”). Apparently, the County is concerned that the operations of certain wireless providers

¹ VoiceStream is a licensed Personal Communications Services (“PCS”) operator in the license area including Anne Arundel County. VoiceStream, combined with Powertel, Inc., is the sixth largest national wireless provider in the U.S with licenses covering approximately 96 percent of the U.S. population and currently serving over seven million customers. VoiceStream and Powertel are wholly-owned subsidiaries of Deutsche Telekom, AG and are part of its T-Mobile wireless division. Both VoiceStream and Powertel are, however, operated together and are referred to in this request as “VoiceStream.”

² *Petition for Declaratory Ruling of Cingular Wireless LLC*, WT Docket No. 02-100 (filed April 23, 2002)(“Petition”); *Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling That Amendments to Anne Arundel County, Maryland Zoning Ordinance are Preempted As Impermissible Regulation Of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission*, WT Docket No. 02-100, *Public Notice*, DA 02-1044 (rel. May 7, 2002).

will potentially interfere with its own public safety communication systems, and has enacted a prophylactic measure to ensure that no wireless facility zoned in the County will cause such RFI.

VoiceStream is a Personal Communications Services (“PCS”) operator in the 1.9 GHz band, and there is no potential for interference between its operations and the County’s public safety facilities, which operate in different frequency bands.³ Even if one assumes that the County has legitimate concerns with potential interference between Commercial Mobile Radio Service (“CMRS”) facilities and its own public safety system, the County, nonetheless, may not lawfully leverage its zoning authority to address operational issues – in this case RFI – that, at bottom, have nothing whatsoever to do with zoning.

As was stated in various initial comments, Cingular’s experience in Anne Arundel County is not unique, and carriers routinely face efforts by governmental authorities to leverage their police powers into other areas.⁴ This has included a variety of extraneous requirements such as submission of financial data, customer service standards, and others – including, of course, RFI requirements – that impose an additional tier of illegal and impermissible regulation on carrier operations and services.

The facts described in the Petition are representative of CMRS provider experience nationwide. Ultimately, the Anne Arundel County ordinance represents unlawful regulation beyond the County’s zoning authority, and an intrusion into the Federal Communications Commission’s (“Commission’s”) exclusive jurisdiction into RFI issues. It is critically important that the Commission grant the instant petition and make clear that the County may not leverage

³ Any PCS operator seeking to construct facilities in the County would nonetheless be directly affected by the ordinance, which requires any applicant for a zoning certificate for a commercial telecommunications facility to provide a certification by a county-approved consultant of non-interference with the County’s public safety systems. Moreover, a zoning certificate must also be issued before the configuration, transmit frequency, or power level of a commercial telecommunications facility may be changed.

⁴ See, e.g., Sprint Comments at 4-9.

its zoning authority to regulate in areas, that while perhaps of concern to the County, have nothing whatsoever to do with local zoning.

I. The Ordinance Exceeds the County's Zoning Authority and Seeks to Regulate Matters Within the Exclusive Jurisdiction of the Commission.

Section 332(c)(7) of the Communications Act preserves local *zoning authority* over wireless facilities. As Cingular noted in its Opposition to the County's Motion to Dismiss,⁵ the language of the section as well as its legislative history reflect that this preservation of authority "relates to local land use regulations." Section 332(c)(7)(B) itself also places important limitations on the exercise of the County's local zoning authority, in particular, barring regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services."⁶

The County's comments could not make clearer that the purpose of the ordinance provisions being challenged is not land use regulation reserved to it by Section 332(c)(7), but to "mitigate" what the County characterizes as "serious, dangerous interference to the existing [800 MHz public safety] network by personal wireless service providers while minimizing future degradation of any new system."⁷

Anne Arundel County attempts to justify Section 1-128(a) of the ordinance, which requires a zoning certificate for changes in the configuration, transmit frequency, or power level of telecommunications facilities, as not directly regulating RFI.⁸ Its comments make clear, however, that the provision's purpose is to "mitigate commercial interference to 800 MHz public

⁵ Cingular Opposition to Motion to Dismiss at 5 and n.15.

⁶ 47 U.S.C. § 332(c)(7)(B).

⁷ Anne Arundel County Comments at iii.

⁸ *Id.* at 12.

safety radio systems.”⁹ While the County portrays the provision as “contain[ing] no mechanism for the County to order the carrier to change its chosen new configuration,” it contains, in fact, the ultimate coercive requirement: the change cannot be made until the County issues the provider a zoning certificate.¹⁰ Moreover, in its comments, the County makes no attempt to portray Section 10-125(j), requiring certification of non-interference with County public safety facilities before a zoning certificate will issue, as anything other than an RFI provision.¹¹

The ordinance thus imposes a series of extraneous requirements exceeding the County’s zoning authority, and enforces compliance by holding hostage the grant of a zoning certificate required to construct those facilities. As urged by AT&T Wireless, Sprint, and United States Cellular,¹² the Commission should not hesitate to issue a declaratory ruling stating that such requirements are unlawful under Section 332(c)(7)(B) of the Act. The recurring reporting and certification obligations would become so burdensome as to perhaps practically prohibit the provision of service in certain areas. Such requirements therefore prohibit or have the effect of prohibiting entities from providing personal wireless services in Anne Arundel County, in violation of Section 332(c)(7)(B)(i)(II).¹³

Apart from the limitations on local zoning authority contained in Section 332(c)(7) itself, the section’s preservation of local zoning authority is not a license for the County, under the guise of that authority, to regulate matters that have nothing whatsoever to do with local land use management. This is made clear by Section 253 of the Communications Act, added by the

⁹ *Id.*

¹⁰ See Ordinance, Section 1-128(a), Anne Arundel County Comments at 13-16.

¹¹ Anne Arundel County Comments at 13-16.

¹² See AT&T Wireless Comments at 8-10, Sprint Comments at 9-12, United States Cellular Comments at 5-6.

¹³ See *City of Auburn v. Qwest*, 247 F.3d 966, 981 (9th Cir. 2001) (recognizing that the imposition of various local requirements that exceed a local jurisdiction’s police powers, and an associated enforcement mechanism that

Telecommunications Act of 1996, which makes unlawful “any State or local statute or regulation, or other State or local legal requirement [which] may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” In *City of Auburn*, the Ninth Circuit made clear that local requirements, such as Anne Arundel County’s here, that extend beyond local police powers by imposing an additional tier of regulation on carrier operations and services, are clearly prohibited by Section 253. As the court held:

Section 253(a) bars all state and local regulations that ‘prohibit or have the effect of prohibiting’ any company’s ability to provide telecommunications services unless the regulations fall within the statute’s “safe harbor” provisions The *preemption is virtually absolute* and its purpose is clear – certain aspects of telecommunications regulation are uniquely the province of the federal government and *Congress has narrowly circumscribed the role of state and local governments in this arena*.¹⁴

In a conclusion that applies with equal force to county governments such as Anne Arundel County here, the court found that “‘*Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications*.’”¹⁵

Here, as discussed above, the ordinance extends beyond the County’s zoning authority and regulates in an area that is “uniquely the province of the federal government”¹⁶ – indeed, as Cingular makes clear in its petition, in an area that is irrefutably within the exclusive jurisdiction of the Commission.¹⁷ As noted in the Petition and by various commenters,¹⁸ Commission

compels compliance, has the effect of prohibiting the provision of telecommunications service, and violates Section 253(a), a provision that parallels Section 332 (c)(7)(B)(i)(II)(“*City of Auburn*”).

¹⁴ *Id.* at 980 (emphasis added).

¹⁵ *Id.* (quoting *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998))(emphasis added).

¹⁶ *Id.*

¹⁷ Petition at 3-6.

¹⁸ See, e.g., Petition at 4-6, Telecommunications Indus. Assoc. Comments at 4-5, United States Cellular Comments at 3-5.

regulation of RFI is pervasive, including establishing procedures by which interference issues are to be resolved.¹⁹ Coordination of RFI is an inherently centralized process and is best conducted by an impartial agency expert in making such determinations.²⁰ Cingular correctly points out that Congress intended for exclusive federal regulation of RFI.²¹

This exclusive Commission jurisdiction was recognized by the United States Court of Appeals for the Second Circuit in *Freeman v. Burlington Broadcasters, Inc.* (“*Freeman*”).²² The court observed that Section 303 of the Act “make[s] clear that Congress intended the FCC to possess exclusive authority over technical matters relating to radio broadcasting”²³ and also noted that “the preexisting pervasive federal regulation of RF interference suffices to resist any negative implication that might otherwise be drawn from subsection 332(c)(7).”²⁴ To this extent, the court preempted the RFI provisions of the permit in question.²⁵ The Tenth Circuit reached a similar conclusion in *Southwestern Bell Wireless v. Johnson County Board of County Commissioners* (“*Johnson County*”),²⁶ noting that “RFI is a federal interest and requires a national approach to regulate the field.”²⁷

In its comments, Anne Arundel County attempts to discount the import of *Freeman* and *Johnson County* through reference to judicial opinions acknowledging local authority over the

¹⁹ See, e.g., 47 C.F.R. §§ 1.929, 1.947, 22.352, 22.353.

²⁰ See Petition at 4-6.

²¹ Petition at 5, quoting H.R. Conf. Rep. No. 765, 97th Congress, 2d Sess. 33 (1982).

²² 240 F.3d 311 (2nd Cir. 2000).

²³ *Id.* at 320.

²⁴ *Id.* at 324.

²⁵ *Id.* at 325.

²⁶ *Southwestern Bell Wireless v. Johnson County Bd. of County Comm’rs*, 199 F.3d 1185 (10th Cir. 1999).

²⁷ *Id.* at 1192.

zoning of personal wireless services.²⁸ Anne Arundel County further attempts to rebut the applicability of *Freeman* by stating that the case concerned broadcast interference with home appliances while the Petition concerns interference with public safety radio communications.²⁹ These distinctions are irrelevant. Anne Arundel County points to no precedent or Commission rule stating why the particular subject matter to which RFI rules are applied should alter the preemptive effect of the Commission's regulations.

The fact that the focus of the County's concerns is interference with its public safety network does not authorize the County to impose its own remedial regulatory scheme to mitigate those concerns, end-running Commission regulations governing licensee redress of such interference issues.³⁰ The significance of Anne Arundel County's concerns over potential interference with its public safety system does not affect the fact that the Commission remains the expert agency that regulates RFI and has chosen to remain so, to the exclusion of local regulation.

Anne Arundel County attempts to rebut the importance of *Johnson County* merely by stating that the Tenth Circuit did not consider Anne Arundel County's argument that Section 332(c)(7)(A)'s reservation of zoning authority to local governments trumps the Commission's exclusive RFI jurisdiction.³¹ As an initial matter, as discussed above, this argument was addressed in *Freeman*, which remains completely relevant. In addition, the Tenth Circuit certainly *considered* the argument that Anne Arundel County makes here, it simply came to the

²⁸ Anne Arundel County Comments at 13-14.

²⁹ *Id.* at 15.

³⁰ As discussed above, the Commission has rules in place governing RFI. *See, e.g.*, 47 C.F.R. §§ 1.929, 1.947, 22.352, 22.353. Sections 0.471 and 0.473 allow a party to file a petition with the Commission regarding violation of the Commission's rules. 47 C.F.R. §§ 0.471, 0.473. In addition, Section 1.141 allows a party to file an informal complaint with the Commission. 47 C.F.R. § 1.141.

³¹ Anne Arundel County Comments at 16.

same conclusion reached in *Freeman*: “[T]he 1996 amendments [creating Section 332(c)(7)(A)] did not alter the FCC’s general authority over radio transmission granted by earlier communications legislation. The [regulation at issue] extends beyond traditional zoning authority (placement, construction, and modification) and into radio telecommunications, an area of FCC authority.”³²

As noted by ALLTEL and CTIA,³³ local radio frequency (“RF”) regulation of any kind threatens to impose a contradictory patchwork of local regulation, and it was precisely these concerns that led Congress to limit local authority over wireless facilities in Section 332(c)(7) to zoning and land use matters. Moreover, Anne Arundel County’s zoning authority does not allow the County to establish lists of approved consultants and engineers³⁴ to certify compliance with RFI requirements that the County has no authority to impose in the first place. The Commission should put an end to these RFI-related ordinances, which, as Sprint notes, are beginning to proliferate and being promoted by certain of these local government consultants that directly benefit from their adoption.³⁵ In sum, whether its concerns are well-intentioned or not, the Communications Act simply does not permit Anne Arundel County to leverage its zoning authority into the regulation of RFI issues.

II. The Commission Should Decisively Rule on the Impropriety of the County’s Use of Its Local Zoning Authority.

Through its ordinance, Anne Arundel County appoints itself arbiter of RFI disputes to which it is a party and imposes its own mitigation measures as an adjunct to its zoning authority.

³² *Johnson County*, 199 F.3d at 1191.

³³ ALLTEL Comments at 2; CTIA Comments at 3, 8.

³⁴ What the ordinance refers to as an “independent consultant acceptable to the Director of the Department of Inspections and Permits.” *See* Ordinance, Section 10-125(j)(1).

³⁵ Sprint Comments at 8.

The Commission has previously condemned such efforts at self-help by licensees to remedy potential interference, and should do so again.³⁶ In addition, the Commission provides a forum in which interference disputes are to be resolved, a forum of which Anne Arundel County should avail itself, if it deems necessary.³⁷ By issuing a declaratory ruling in this matter, the Commission can send a strong signal that wireless development and competition cannot be held hostage to efforts such as those by Anne Arundel County, which seek to impose regulatory requirements beyond the scope of local zoning authority.³⁸

Anne Arundel County cites no reason why the Commission would not be permitted to act immediately on the petition, but asks the Commission simply to disregard the County's regulatory overreaching. Instead, the County makes the astounding statement that the ordinance amendment, which was enacted into law last January, "is a work in progress" and that a ruling by the Commission at this time might "disrupt the current cooperation between carriers and County toward [its] possible revision."³⁹ VoiceStream appreciates the County's ongoing efforts to discuss constructively the concerns with the ordinance raised by the carriers. That being said, the fact remains that the ordinance is in force and imposes ongoing and substantial burdens on

³⁶ See, e.g., *American Television and Communications Corp. Englewood, Colorado*, FCC 78-795, 44 RR 2d 923 (Nov. 13, 1978) ("[T]he issue is whether a Commission licensee, as self-appointed protector of the airwaves, may shut down necessary communications services at its own will. Commission ratification of ATC's actions portends a scenario of nightmarish proportions, with each licensee taking any and all actions necessary to protect what it subjectively conceives of as its best interests."); see also *MobileComm of New York*, DA 87-1237, Memorandum Opinion and Order, 2 FCC Rcd 5519 (1987).

³⁷ See, e.g., AT&T Wireless Comments at 10-11, CTIA Comments at 9-10.

³⁸ Anne Arundel County includes in its comments a description of alleged statements by VoiceStream's local counsel, Karl Nelson, supposedly addressing the Anne Arundel County ordinance. According to the County, Mr. Nelson, supposedly "agreed that the courts, preferably federal court, would be the place to challenge such a County action," and also agreed that "[t]he chief basis for the challenge . . . would be federal preemption of the County's authority to suspend their clients' operations." Anne Arundel County Comments at 3-4. Anne Arundel County in no way explains the relevance to this proceeding of these alleged statements, or the purpose for which they are offered. In any event, VoiceStream disputes the characterization of Mr. Nelson's comments. At no time did Mr. Nelson say or intone that federal court action was the exclusive relief available to VoiceStream.

³⁹ *Id.* at 9.

carriers. That the County may be having after-the-fact discussions with carriers about concerns that it refused to address in enacting the ordinance in the first place, takes nothing away from the importance of the Commission taking immediate action on the petition now.

III. Conclusion.

For the reasons stated above, VoiceStream Wireless Corporation respectfully requests that Cingular's Petition be granted.

Respectfully submitted,

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Dated: June 25, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June 2002, a copy of the foregoing Reply Comments of VoiceStream Wireless Corporation were served, by hand or via United States first class mail, postage prepaid, on the following persons:

/s/

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